Supreme Court, U.S.
FILED

(1)

951868 APR 2 2 1996

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SHIRLEY THOMPSON, Administratrix of the Estates of Michael Tabor and Brett Tabor; PATRICIA TABOR, Individually, and as parent for Joshua Tabor -- PETITIONERS

VS.

BIC CORPORATION -- RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TERRENCE A. VALKO
Attorney for the Petitioners
Terry Valko Professional Corporation
3037 Broad Avenue
Altoona PA 16601
814-946-4505

27 pp

QUESTIONS PRESENTED

In a diversity case, did the federal courts deprive the petitioners of their civil rights as protected under Pennsylvania common law by applying a standard of review which has been proscribed by the Pennsylvania Supreme Court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Questions Presented	1
List of Parties	2
Petition for Writ of Certiorari	4
Jurisdiction	5
Statement of Case	6
Reasons for Granting the Petition	8

INDEX TO APPENDICES

Appendix A: Memorandum Opinion of the Court	12
Appendix B: Memorandum Order	13
Appendix C: Report and recommendation	15
Appendix D: Memorandum	21

TABLE OF CITED AUTHORITIES

Purdon's Pa. Statutes, Const. Art. 1, sec. 6, note 1, 239	8
State Cases	
Byers v. Com. 42 Pa. 89 (1862)	8
Com. v. Eckhart, 242 A. 2d 271, 430 Pa. 311 (1968)	8
Gordon v. Blesinger, 6 A.2d 425, 335 Pa. 1 (1939)	8
Smith v. Bell Telephone Company of Pa. 153 A.2d 477, 397Pa.(1959)	8, 9, 10
Federal Cases	
City of Philadelphia v. Lead Industries Assn', 994 F.2d 112 (3rd Cir. 1993)	8
Yeager v. J.R.Christ Co. 364 F.2d 96 (1996)	10
28 U.S.C. sec. 1254 (1)	5
28 U.S.C. sec. 1332	6
28 U.S.C. sec. 636 (b) (1)	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The Memorandum Opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The Memorandum Order of the United States district court appears at Appendix B to the petition and is unpublished.

The Report and Recommendation of the federal magistrate judge, which was incorporated into the opinion of the United States district court, appears at Appendix C and is unpublished.

The Memorandum of the federal magistrate judge appears at Appendix D and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was January 23, 1996.

No petition for a rehearing was filed in this case.

The Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

This case involves a Memorandum Order of the United States District Court for the Western District of Pennsylvania, March 29, 1995, granting the respondent's motion for summary judgment.

On April 21, 1993 the petitioners filed a complaint, alleging that the respondent was liable to them for damages due to negligence for failing to equip a cigarette lighter with a childproof device that would have prevented two-year-old Brett Tabor from starting a fire that killed him and his brother Michael and seriously injured his mother and a third brother, Joshua. Because of the diversity of citizenship and because the amount in controversy exceeds $50,000, subject matter jurisdiction rests upon 28 U.S.C. sec 1332, and the complaint was filed in federal district court.

After discovery the respondent filed a motion for summary judgment, alleging that (1) it could not be liable as a matter of law, and that (2) the evidence was insufficient to establish causation. The motion was referred to a magistrate judge for a report and recommendation in accordance with the Magistrates Act, 28 U.S.C. sec. 636 (b) (1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The magistrate judge's report and recommendation, filed March 6, 1995 , rejected the respondent's first argument that it was not liable as a matter of law, but the report and recommendation accepted the repondent's argument regarding causation and claimed that the respondent's motion should be granted because (1) the petitioners could not prove that two-year-old Brett, and not six year old Michael, had started the fire, and (2) the petitioners could not prove that a BIC lighter, as opposed to matches or another brand of lighter, was used to start the fire.

Pursuant to 28 U.S.C. sec. 636 (b) (1), the parties were notified that they had ten days in which to file objections to the report and recommendation. The petitioners filed objections to the portion of the report and recommendation which found insufficient causal evidence. In the objections the petitioners noted several issues of genuine material fact:

Regarding the question as to who started the fire, the petitioners noted that the only witness, Patricia Tabor, had testified under direct and cross examination that she had been awake for twenty minutes before the fire started and that Michael was not in the room at all during that time.

Regarding the question as to what started the fire, the petitioners note that contrary to the Report and Recommendation, the deputy state fire marshal, Pennsylvania State Trooper James Behe, testified that the results of his investigation led him to conclude that a lighter, and not matches, was used to start the fire. The petitioners noted that Tabor testified that she used BIC lighters, and only BIC lighters, that she had attempted to hide her lighters in a cosmetics case under the couch where the fire started, and that she observed no other lighters or matches in the room.

After submitting the objections, the petitioners' attorney received a Memorandum by the magistrate judge who authored the Report and Recommendation, in which the magistrate judge launched an all out adversarial assault on the credibility and sufficiency of the petitioners' evidence. Among other things, the Memorandum argued that Tabor's testimony conflicted with other evidence, in spite of the fact that the court is not to weigh evidence when considering motions for summary judgment; the Memorandum questioned the credibility of the petitioners' witnesses, in spite of the fact that credibility determinations are in the domain of the jury, not the court; and the Memorandum denied the existence of the state fire marshal's testimony that his investigation led him to conclude that a lighter was used to start the fire, in spite of the fact that it is clearly contained in the record of his deposition.

Immediately on receiving the Memorandum, the attorney for the petitioners called the clerks office at the United States District Court and requested a chance as the non-moving party to have the last say by responding to the memorandum. He was told that the plaintiffs had ten days to do so. Before the ten days expired, the court granted the defendant's motion for summary judgment.

The petitioners filed an appeal to the United States Court of Appeals for the Third Circuit, which upheld the district court's dismissal.

REASONS FOR GRANTING THE PETITION

The common law right to a trial by jury in civil cases is one of the most sacrosanct principles of law in the English speaking world. Perhaps nowhere is this common law right as rigorously preserved as in Pennsylvania common law.

The right to a trial by jury is preserved in the current Constitution of Pennsylvania as it was originally enacted in the Constitution of 1776, which established that it ought to be "held sacred." Pa. Const. Art. 1, sec. 6, note 1. The Pennsylvania Supreme Court has held that statutes impinging on the right to trial by jury "are to be strictly construed," Gordon v. Blesinger, 6 A.2d 425, 335 Pa. 1 (1939); that the section of the Constitution containing this right "must be construed with reference to the statutes and usages that were in force in England, and in the province of Pennsylvania, at the adoption of the first state constitution, Byers v. Com., 42 Pa. 89 (1862); and that the ""cardinal principle of this right is that essential features of trial by jury, as known at common law shall be preserved." Com. v. Eckhart, 242 A. 2d 271, 430 Pa. 311 In diversity cases such as this, the 3rd Circuit has ruled that "federal courts may not engage in judicial activism. Federalism concerns require that we permit state courts to decide whether and to what extent they will expand common law." City of Philadelphia v. Lead Industries Assn', 994 F.2d 112 (3rd Cir. 1993).

The controlling Pennsylvania case in defining this common law right in matters of granting summary dismissal is Smith v. Bell Telephone Company of Pennsylvania, 397 Pa. 134, 153 A.2d 477 (1959), in which the plaintiff met with a compulsary non-suit in the Court of Common Pleas after presenting circumstantial evidence to show that a conduit constructed by Bell had caused his sewer lateral to collapse. In summarizing the case the Supreme Court of Pennsylvania defined the issue as follows:

> In support of the judgment of non-suit the court below applied the standard that where plaintiff's case is based on circumstantial evidence, such evidence must be so conclusive as to exclude any other reasonable inference inconsistent therewith, and that plaintiff did not produce such evidence. *Indeed, he did not, but did he have to?* Smith, 479. (emphasis added.)

The Court ruled that he did not:

> The formula that "the circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances" is not a correct statement of the rule to be applied by the judge on deciding a motion for either a non-suit or binding instructions. If that were the rule what would be the province of the jury. In no case where there was more than one reasonable inference would the jury be permitted to decide. Insofar as this rule is stated in our cases it is disapproved. Smith, supra.

The Court than proceeded in a footnote to supply a *partial* list of 18 published cases that had cited the rule which it had just proscribed, and then went on to further restrict the ability of courts to remove cases from a jury:

> It is not necessary, under Pennsylvania law, that every fact or circumstance point unerringly to liability . . . Also, it is beyond the power of the court to say whether two or more reasonable inferences are equal . . . The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way. *A substantial part o the right to trial by jury is taken away when judges withdraw close cases from a jury.* Smith, 480. (emphasis added)

In spite of its clear intent to expand the common law right to trial by jury, Smith can be abused by citations taken out of context. Smith does indeed acknowledge that a jury may not be permitted to reach a verdict merely on the basis of speculation and conjecture. However, this is not the point of Smith; it is merely a preamble stating a precedent subject to abuses that Smith was designed to correct, not perpetuate:

> Clearly this does not mean that the jury may not draw inferences based upon all the evidence and the jurors' own knowledge and experiences, for that is, of course, the very heart of the jury's function It means only that the evidence presented must be such that by reasoning from it, without resort to prejudice or guess, a jury can reach the conclusion sought by plaintiff, and not that that conclusion must be the *only* one which logically can be reached. Smith, 480. (emphasis stands in context)

In the past the appellate court has ruled that federal courts may not be guided by a precedent which was expressly overruled in Smith. Yeager v. J.R.Christ Co. , 364 F.2d 96 (3rd Cir. 1966).

In the instant case summary judgment was granted for two reasons:

First, in spite of the fact that the mother testified that she was alone in the room with Brett at the time that the fire started, a federal magistrate judge found that since the mother did not actually see Brett start the fire, it is equally possible that Michael entered the room unobserved, ignited the fire, and exited the room unobserved, and therefore a jury could not return the verdict which the petitioners seek except on sympathy and speculation. However, in order to avoid summary judgment under Pennsylvania common law a plaintiff's evidence need not exclude all other possibilities. And although Smith acknowledges that in cases where two inferences are equally possible a jury may not return a verdict based on sympathy and speculation, Smith specifically states that it is beyond the power of the court to say when two inferences are equal: that determination must be left to the jury. **Smith explicitly removes from judges the power to remove such cases from the jury.**

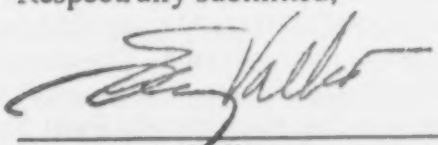
Second, the federal magistrate judge found that it is possible from conflicting evidence that a jury might infer that another brand of lighter or matches could have been used to ignite the fire. Here again, under Pennsylvania law a plaintiff's evidence need not eliminate all other possibilities, and Smith explicitly states that such cases cannot be removed from a jury with denying that plaintiff a substantial part of their right to a trial by jury.

The petitioners are prepared to show in their Brief on the Merits of the Case, by specific example and citation of the text of the opinion, that the district court overtly applied the very standard of review that was overruled by Smith, in no less than eighteen cases. The petitioners will also show that Smith was designed specifically to remove from judges the power to remove cases such as this from a jury. And finally the petitioners will show that by applying a standard of review specifically proscribed by Smith, the federal district court deprived the petitioners of a right that Pennsylvania defines and protects as "sacred" under common law, and that by sanctioning such a proceeding the appellate court leaves the petitioners no relief other than to petition this Court to exercise its supervisory power by issuing a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Terrence A. Valko
Attorney for the Petitioners
Terry Valko Professional Corporation
3037 Broad Avenue
Altoona PA 16601
814-941-4505

Date: 4-19-96

United States Court of Appeals
For the Third Circuit

No.95-3243

January 23, 1996

MEMORANDUM OPINION OF THE COURT

Weis, Circuit Judge

Plaintiffs have brought suit for personal injury and wrongful death resulting from a fire that occurred on May 3, 1991 in a house at 709 Lexington Avenue, Altoona, Pennsylvania. The complaint alleged that the defendant was negligent in failing to "child-proof" its cigarette lighters. The plaintiff's theory is that two year old Brett Tabor started the fire while playing with a BIC lighter.

After discovery, the case was referred to a magistrate judge for review of the defendant's motion for summary judgment. After reviewing the evidence, the magistrate judge filed a report recommending that the motion be granted because the plaintiff was unable to establish that Brett started the fire, or that it was caused by a BIC lighter. The district Judge adopted the report of the magistrate judge as to the causation issue, and granted the motion for summary judgment.

In a negligence action, the plaintiffs have the burden of proof to establish conduct on the part of the defendant that does not meet the standards of due care. In addition, plaintiffs must prove that the action of the defendants was the legal cause of injuries incurred. The burden of proof may be met by circumstantial or direct evidence.

We have carefully reviewed the briefs of the parties as well as the reports of the magistrate judge and the memorandum opinion of the district judge. We agree that there is simply no adequate evidence to establish who started the fire and by what means. Plaintiff's theory is pure speculation as to how this tragedy occurred, and is an insufficient basis to submit the case to a jury.

Accordingly, the judgment of the district court will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 93-105J

March 29, 1995

Memorandum Order

Plaintiffs filed a complaint alleging that defendant, a manufacturer of disposable lighters, was liable for negligently failing to equip its lighters with a child-proof ignition that would have prevented a two year-old child, Brett Tabor, from starting a fire that killed both him and Michael Tabor, age 6, and injured their mother, Patricia Tabor, and infant brother, Joshua Tabor. After discovery, defendant filed a motion for summary judgment, alleging that it could not be liable as a matter of law, and that the evidence was insufficient to establish causation. The motion for summary judgment filed by defendant in this matter (Docket No. 22) was referred to Magistrate Judge Keith A. Pesto for a Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. sec. 636 (b) (1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Magistrate Judge's Report and Recommendation, filed March 6, 1995 (Docket No. 27), recommended that the defendant's motion for summary judgment be granted. The Report and Recommendation rejected defendant's argument that it is not liable as a matter of law because the risk-utility analysis employed in Griggs v. BIC Corp., 981 F.2d 1492 (3d Cir. 1992) , is not consistent with the current state of Pennsylvania negligence law. The Report and Recommendation found, however, that due to plaintiffs' failure to establish causation, the record contained insufficient evidence to allow plaintiffs' negligence claim to proceed.

The parties were notified that pursuant to 28 U.S.C. sec. 636 (b) (1), they had ten days to serve and file written objections to the Report and Recommendation. Defendant filed objections on March 16, 1995 (Docket No. 28), objecting to the portion of the Recommendation which rejected defendant's legal argument. Plaintiffs filed objections on March 17, 1995 (Docket No. 29), objecting to the portion of the Report and Recommendation which found the evidence of causation insufficient. The magistrate judge then referred the objection, together with a memorandum addressing those objections (Docket No. 30) to the undersigned.

After de novo review of the record of this matter, together with the Report and Recommendation and the objections thereto, I adopt the Report and Recommendation's overview of the case (set forth at pp. 1-

6 of Docket No. 27), and the discussion and holding with respect to the issue of causation (set forth at pp. 13-19 of Docket No. 27) as the opinion of the Court.

Because plaintiffs have failed to establish causation, I find that it is unnecessary to reach the issue concerning the impact of Fitzpatrick v. Madonna, 424 Pa. Super. 473, 623 A.2d 322 (1993), on the analysis of Pennsylvania of Pennsylvania law in Griggs v. BIC Corp., 981 F.2d 1429 (3d) Cir. 1992). For this reason, I do not adopt that portion of the Report and Recommendation (pp. 6-12 of Docket No. 27).

AND NOW, this 29th day of March, 1995, it is

ORDERED that defendant's motion for summary judgment (Docket No. 22) is granted. The Clerk shall mark this matter closed.

BY THE COURT

D. BROOKS SMITH,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Docket No. 27

March 6, 1995

Report and Recommendation

(Portions adopted as the opinion of the court in the **Memorandum Order** of March 29, 1995)

pp. 1-6 (overview)

Recommendation

The motion for summary judgement of the defendant, BIC Corporation, docket no. 22, was referred to me pursuant to the Magistrates Act, 28 U.S.C. sec 636 (b) (1), and subsection 4 of Local Rule 72.1 for Magistrate Judges. I recommend that defendant's motion be granted.

Report

Adjacent to Altoona's downtown commercial district, sandwiched between the Altoona '"Hospital complex and the railroad tracks which bisect the city, is a remnant of a neighborhood occupied by renters, the Salvation Army's residential facility, and the vacant YMCA. In early May 1991, Shirley Thompson was renting a two and one half story brick rowhouse in that neighborood, 709 Lexington Avenue. Residing with her were Frank West, described by plaintiff's counsel as Thompson's "significant other," Plaintiff's Memorandum at 2, docket no. 24, her adult son Gary Hartman and his girlfriend or wife, Cassie, her daughter Linda Hartman, her 14 year old daughter Melissa Thompson, her 20 year old daughter Patricia Tabor, and Tabor's three children: Michael, age 6; Brett, age 2 years 10 months, and Joshua, age 3 months. Thompson's sister and brother in law, Gloria Woodley and Randy Woodley, were in town visiting Thompson and also staying at the residence. Several of the residents of the address were smokers, and there were matches and different brands of disposable lighters in the house. Tabor deposition at 33, 35-36, 81. Shirley Thompson brought cigarette lighters home from the bar she and Frank West operated; Melissa Thompson stole lighters or picked up her mother's lighters for her use. Melissa Thompson deposition at 11-12; Tabor deposition at 31.

On the evening of May 2, 1991, Patricia Tabor worked as what is called a dancer at the Palace, a local establishment of what is called adult entertainment. She left work at approxamately 1:00 o'clock on the morning of May 3, 1991, and went to the Eighth Avenue Lounge until about 2:30 a.m., where according to her counsel she "partied into the morning." Plaintiff's Memorandum at 2. She recalled drinking beer and using prescription drugs, but did not recall whether she had a hangover as a result. From about 2:30 a.m. until 7:00 a.m., Patricia Tabor sat outside her residence with a male acquaintance, then called a cab to pick up her three children from their babysitter. On the way back to her residence, Tabor stopped at the Sheetz convenience store on 13th Street, and purchased a pack of Newport cigarettes. Tabor had with her, and perhaps had purchased at the same time as the cigarettes, a pink BIC lighter. Tabor smoked approximately one pack of cigarettes per day, and purchased her cigarettes one pack per day. She had several lighters, all pink, in her purse and in her portion of the residence at 709 Lexington Avenue. Tabor deposition at 50. Tabor returned to the residence with her three children, and placed her cigarettes, lighter, and cosmetics case with three or four other lighters in it under a couch in the first floor living room. Tabor deposition at 73. She lay down on the other couch in the room with the infant, Joshua, and perhaps fell asleep. The toddler, Brett remained in the room with her, while the child Michael went upstairs. During the next few hours the other residents and visitors left the house; Tabor and her three children remained, and Gloria Woodley was asleep in a bedroom on the second floor.

At approximately 10:30 a.m., Tabor was awakened or alerted by her son Brett tuging at her, saying "Mommy, Mommmy" and pointing at the couch where Tabor had hidden her lighter. The couch was on fire. Tabor ran to the kitchen sink, perhaps ten steps away, to fetch a pan of water from the sink Tabor called 911 to report the fire. When she returned, she could not find Brett in the now smoke-filled room, and could not extinguish the fire, now spreading throughout the room. Tabor scooped up Joshua from the couch where he lay, and ran outside. Gloria Woodley, having exited to a porch roof, climbed down a tree to the ground. Tabor attempted to reenter the house, now engulfed in flames, but could not save Brett. The building was destroyed by fire. Tabor depsoition at 74-79. Brett's body was found on the first floor. Michael's body was found in the second floor hallway. Tabor did not realize Michael was in the house because he customarily would go outside and play. Tabor deposition at 73-74. Mercifully, both children had died from carbon monoxide poisoning before their bodies were charred. Defendant's Motion, Exhibit E. (Behe deposition) at 4-5.

Patricia Tabor and Joshua were taken to the Altoona Hospital, and then flown to the Burn Trauma Unit of West Penn Hospital in Pittsburgh, where both were treated for extensive third degree burns. Joshua developed an infection which required surgery at the Children's Hospital of Pittsburgh to implant a prosthetic heart valve.

Almost at the expiration of the limitations period, plaintiffs filed a complaint closely tracking the Court of Appeals' opinion in Griggs v. BIC CORP., 981 F.2d 1429 (3d Cir.1992), alleging that the defendant was liable for the injuries to Tabor and Joshua, and the deaths of Michael and Brett, because Brett had been the one who started the fire with the BIC lighter Tabor placed beneath the couch, and that BIC was negligent for selling the lighter withour a child-resistant ignition.

After discovery had closed, defendant moved for summary judgment for two reasons:

1) BIC asserts that it cannot be negligent as a matter of law, relying on syllogism: a) a cigarette lighter is not a defective product as that term has been defined in Pennsylvania's products liability law even if it lacks a child-resistant ignition, because childplay is not the intended use of the product, see Griggs; b) Pennsylvania law holds that if the product is not defective, the plaintiff has no cause of action in negligence, see Fitzpatrick v. Madonna, 424 Pa. Super. 473, 623 A.2d 322 (1993), allocatur denied ; c) therefore plaintiffs have no cause of action in negligence;

2) BIC asserts that, even assuming that it breached a duty to plaintiffs in failing to childproof its cigarette lighters, the plaintiffs have insufficient evidence to prove causation. First, BIC contends, there is insufficient evidence that a BIC lighter, childproof or otherwise, was used to start the fire. Second, the evidence is allegedly insufficient to allow an inference that Brett, and not Michael, started the fire. BIC asserts without contradiction that no commercially feasible design can prevent a six year old from using a lighter and that because Michael started the fire any childproofing of the lighter would not have affected the outcome.

pp. 13-19 (causation)

Causation: who started the fire?

BIC points out that unless the plaintiffs can prove that Brett started the fire (with a BIC lighter), the presence or absence of a child-resistant ignition was not a causal factor in the fatal fire, because no one contends that a feasible design exists that would have prevented Michael from starting the fire. Plaintiffs assert that the evidence is sufficient to show that it was "little Brett" that "summon[ed] the Devil's only friend." Plaintiffs' Memorandum at 24. This lyrical assertion aside, plaintiffs' Memorandum at 4-5: Tabor told Gloria Woodley the

morning of the fire that Brett was playing with a lighter, Tabor had left several lighters under the living room couches within Brett's reach, and after the fire started Tabor saw Brett and not Michael in the room.

Assuming that the police record of Tabor's statement to Gloria Woodley on the morning of the fire overcomes the Johnson v. Lutz hurdle as an excited utterence, it only tends to show that "Patricia thinks that Brett was playing with a lighter, "Sergeant DeFrancesco Report at 2, Plaintiffs' Memorandum, Exhibit B, or that Tabor stated "I think Brett was playing with a lighter." Detective Sassano Report at 2, Plaintiffs' Memorandum, Exhibit C. The assertion by Tabor is only admissable if supported by personal knowledge. F.R.E. 602. Tabor, however, testified that she had been up since the previous evening either at her place of employment, a bar, or with an acquaintance and was dozing in and out of sleep, and did not see any of the events that led up to the fire, and knows of no one that did. Tabor deposition at 89-90. As for the question of access, what was accessible to a two or three year old was obviously accessible to a six year old. As for seeing Brett and not Michael after the fire started, it proves nothing because the relevant time was when the fire started, an unknown amount of time before Tabor was roused by Brett. It would pose an obvious addidtional hurdle to plaintiffs if Tabor had seen either one of the boys with a lighter, since nothing was done to stop him.

Pennsylvania State Trooper James Behe, the deputy fire marshal for the seven county region including Altoona since 1978, Behe deposition at 1-2, opined that Michael, not Brett, started the fire. His chief reasons for concluding this are possibly not matters which would be permissible in evidence, chiefly hearsay statements from an apparently unavailable witness, Tabor's brother Gary Hartman, that Michael was a firebug who had previously set other fires and who, on a visit to S.C.I. Cresson to see Tabor's brother Chester Tabor, had been found with cigarette lighters on his person Behe also believed that Michael started the fire because he was found upstairs with his tennis shoes on and his pants down, indicating to Behe that Michael had caught his pants on fire and was attempting to escape. A jury would have ample reason for rejecting this conclusion, but the absence of proof that Michael started the fire does not carry plaintiffs' burden to prove by competent evidence that Brett started the fire. Because of the lack of evidence on this point, summary judgment must be entered for BIC.

Causation: what started the fire?

Bic identifies what is an even more basic evidentiary lack in plaintiffs' case, namely that there is nothing more than an assertion by the plaintiffs that it was a BIC lighter that caused the fatal fire. BIC points to the affidavit of its expert engineer, James McDonough, docket no. 22, Exhibit J, which states that 5 identifiable components of BIC's

non-childproof J-6 lighter, alleged by plaintiffs to be the lighter used by Brett to trigger the fire, would have survived a 2000 degree fire. No remnants of a BIC lighter were found near the fire which was estimated to have had a maximum temperature of 1600 to 1800 degrees. Behe deposition at 45, Mascia deposition at 35. Further, neither of the two expert investigators who examined the scene, Altoona's Fire Inspector Mascia or Pennsylvania State Police Deputy Fire Marshal Behe, identified any lighter as being the cause of the fire. The fire inspectors can opine only that some open flame from an unknown source, not a cigarette, started the living room couch fire that spread throughout the residence. Behe deposition at 6. Mascia found only matches, "pads of matches," in the area where the fire started. Mascia deposition at 16, 19. In response, the plaintiffs can point only to Patricia Tabor's testimony that she used BIC lighters, "there could have been" a BIC lighter i n her purse under the couch where she was lying, and had several BIC lighters in her cosmetics case which she placed under the other couch in the living room, where the fire started. Tabor deposition at 80, 85-87. Tabor assumed that a BIC lighter was involved. Id.

It is conceivable that a BIC lighter was the cause of the fire. When an explanation consistent with BIC's product being involved is as likely as an explanation consistent with a pack of matches or another manufacturer's lighter, however, only speculation and sympathy could have cause a jury to return a verdict against BIC. This is impermissible. See Lonen v. Pep Boys, Manny, Moe, and Jack, 371 Pa.Super. 291, 538 A.2d 22, 26 (1988).

Plaintiffs do point to one other piece of evidence in support of their contention that even though no parts of a BIC lighter were found it was BIC's product that started the fire, which I believe it is instructive to set out in plaintiff's counsel's own words:

> At some point after the fire, and individual or individuals used a bolt cutter to gain entry to the premises for an unknown reason: arguably, to conduct and investigation... This small fact may become relevent as the Defendent Corporation insisits that five components of one of its lighters may have withstood the 2,000 degree flames. *** Plaintiffs represent that neither they nor any attorney or agent on their behalf re-entered the death scene at the time of the landlord's complaint to Altoona Police Department [that the premises were entered]. The landlord herself did not authorize any investigator or insurance carrier to enter onto the premises. The legal authorities who had conducted the investigation to that point and thereafter deny entering the premises. It may be an inference the jury will make in the near future that agents of the Defendant may have entered those

premises and sifted or removed debris." Plaintiffs' Memorandum at 6, 22.

It may be charitably said that plaintiffs have committed the logical fallacy of composition rather than proffered some nutcase corporate conspiracy theory that would make Oliver Stone chuckle and John Grisham blush, but in either case no jury would be allowed to draw any such inference, because there is no evidence in support of such an inference.

Disregarding plaintiffs' theory, it is possible that a reasonable jury could disbelieve that the matches found near the spot that the fire started were the efficient cause of the fire, and it is also plausible that no BIC components were found near the site of the fire because the investigators simply missed them, they were swept away in fire-fighting efforts, or were consumed in a fire of greater than estimated heat. Nonetheless, because it is plaintiffs' burden to prove BIC liable and not BIC's burden to disprove its involvement, no jury could conclude that BIC is liable on any basis other than speculation and sympathy.

United States Court of Appeals
For the Third Circuit

No. 95-3243

January 23, 1996

MEMORANDUM

On May 3, 1991, a fatal fire took placed in which Michael Tabor, age 6, and Brett Tabor, age 2, were killed. Plaintiffs filed a complaint alleging that the defendant, a manufacturer of disposable lighters, was liable for negligently failing to equip its lighters with a child-proof ignition that would have prevented Brett Tabor from starting the fire. After discovery, the defendant filed a motion for summary judgment alleging that it could not be liable as a matter of law, and that the evidence was insufficient to allow an inference that Brett Tabor had started the fire with a BIC lighter. The motion for summary judgment filed by the defendant in this matter, docket no.22, was referred to me for a Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C.§ 636 (b) (1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Report and Recommendation, filed March 6, 1995, recommends that motion for summary judgment be granted. The Report and Recommendation rejects defendant's argument that it is not liable as a matter of law because the risk-utility analysis employed in Griggs v. BIC Corp., 981 F.2d 1429 (3d Cir.1992) is not consistent with the current state of Pennsylvania negligence law, but finds that the record contains insufficient evidence to allow plaintiff's claim that plaintiffs were injured as a result of Brett Tabor's use of the defendant's product to go to the jury.

The parties were notified that pursuant to 28 U.S.C.§ 636 (b) (1), they had ten days to serve and file written objections to the Report and Recommendation. The defendant filed objections on March 16, 1995, docket no. 28, objecting to the portion of the Report and Recommendation which rejected defendant's legal argument; plaintiff filed objections on March 17, 1995, docket no. 29, objecting to the portion of the Report and Recommendation which found the evidence of causation insufficient.

Because I believe the plaintiffs' counsel's objections distort the record and the Report and Recommendation, I am filing this memorandum, which addresses the plaintiffs assertions that the evidence of causation is sufficient to allow an inference that the two-year old Brett Tabor started the fire, and did so with a BIC lighter:

Plaintiffs point to five additional places in the record where they contend evidence of the facts supporting their claim is found:

1) The report of Pennsylvania State Police deputy fire marshal James Behe, states "[Gloria Woodley] stated that [Patricia Tabor] told her that BRETT set the couch on fire." Plaintiffs contend this is direct evidence that Brett Tabor started the fire. See Objections at 2.

2) Tabor was not asleep at the time the fire started and had been awake for twenty minutes before the fire started. She saw Brett Tabor and did not notice Michael Tabor in the living room during this time. Plaintiffs contend this is circumstantial evidence that supports the inference that Brett Tabor and not Michael Tabor started the fire. See Objections at 2-3.

3) Patricia Tabor testified that she used only BIC lighters and that she had several of them in the cosmetics case placed under the couch where the fire started. Plaintiffs contend that this supports an inference that it was a BIC lighter that was used to start the fire. See Objections at 3-4.

4) Plaintiffs assert that the Report and Recommendation is false when it asserts that neither of the two investigators who have given an expert opinion concerning the cause of the fire has identified a lighter as the cause of the fire, and that the Report and Recommendation "is not completely true" when it states that matches were found in the area where the fire started. Additionally, Melissa Thompson, Tabor's sister, testified that she had her lighter with her at the time of the fire and that "extreme cautions were always taken to keep ignition devices away from the children... ." Plaintiffs argue that by a process of elimination a jury could conclude that a BIC lighter was used to start the fire. See Objections at 4-6.

5) Defendant has failed to produce any evidence that there were any brands of lighters other than BIC's in the house at the time of the fire. It appears that plaintiffs contend that this

supports the inference that a BIC lighter was used to start the fire. See Objections at 6.

Turning to the Behe report first, it is clear that what would be admissible at trial is Trooper Behe's testimony, not the hearsay contents of Trooper Behe's Report, since there is no contention by anyone that Trooper Behe did not have a vivid recollection concerning the events that led to him writing his reports. See F.R.E. 803(5). Trooper Behe's own testimony, as recorded at his deposition, is quite clear: he was of the opinion that Michael Tabor started the fire, basing this on his analysis of the burn pattern, carbon monoxide levels, some probably inadmissible evidence that Michael Tabor had previously been involved in setting fires, and the position of and clothing on the body of Michael Tabor. Behe deposition at 4-5, 7.

Behe did write in his report what he recalled Gloria Woodley telling him at the time he arrived to conduct an investigation several hours after the fire was out. Behe deposition at 7, 46-47. There is no deposition of Gloria Woodley in the record, but since her testimony would have to be offered to prove that Patricia Tabor actually told her that Brett started the fire, her statement would also be hearsay, F.R.E. 801 (c), and inadmissible unless it could qualify as an exception within F.R.E. 803. There is nothing to indicate that the statement was made while still under the stress of excitement caused by the fire, see F.R.E. 803(3), and plaintiffs do not suggest any other exceptions to the exclusion of hearsay. On this record, the Gloria Woodley statement could not be admitted into evidence for that reason alone.

Ultimately, the statement that the plaintiffs wish the jury to hear is Patricia Tabor's assertion that Brett started the fire. In her deposition, Patricia Tabor states that she does not know how the fire began and that she only inferred that it was started by Brett because she saw him after the fire started and believed that Michael was either upstairs asleep or not in the residence. See Tabor deposition at 71-71, 73-74, 89-90. The Tabor statement embedded in the Woodley statement in the Behe report, even if it overcame all the hearsay hurdles, still could not be admitted because it is not based on personal knowledge, F.R.E. 602, as the Report and Recommendation pointed out concerning the similar statements in the Sassano and DeFrancesco reports.

Plaintiffs' assertion that their evidence that Brett Tabor started the fire is strengthened by an assertion that Patricia

Tabor was awake at the time the fire was set and for the twenty minutes before the fire was set is troubling for two reasons. First, it requires that Patricia Tabor's own account of her actions be disregarded. Patricia Tabor testified in her deposition that she had worked from about 7:15 p.m. the evening before the fire, Tabor deposition at 41-42, until approximately 1:00 a.m., and then had gone out with friends until approximately 2:30 a.m., and then spent the next four or five hours either talking outside of her residence or commuting to her children's baby-sitter's residence and back. Id. at 44-46, 54. She repeatedly testified that she returned to the residence and fell asleep. Id. at 65, 66, 67. Patricia Tabor then testified that "When the fire started, I was like in and out. I was more or less awake." Id. at 68. In response to questioning concerning why the averments of her complaint stated that she had been "awakened by Brett" at the time of the fire, she testified then: "I was, might as well say I was. [Brett] came over and said 'Mommy, mommy.' I mean, I wasn't sleeping. I can say I was do[z]ing off. But I wasn't sleeping when he came over and approached me." Id. at 89. However fine one wants to split hairs between dozing, "going in and out," and sleeping, it is clear from Tabor's deposition that she was not conscious of event in the living room at the time the fire was set, and only became aware of them after Brett alerted her to them, an unknown time later. This is consistent with the account she gave much closer to the time of the fire. Behe deposition at 23-24; see Behe Report at 10.

Second, plaintiffs' assertion that a jury could infer that Brett Tabor started the fire because Patricia Tabor was awake and saw him allegedly immediately before the fire requires that the factfinder believe that Patricia Tabor was awake in the same room as her two year-old child, as he retrieved allegedly a BIC lighter and started a fire with it, and did not take any action. If that is the case, no reasonable jury could find that the cause of the fire was anything other than parental neglect.

Patricia Tabor's testimony that she used only BIC lighters and had several of them in the cosmetics case she placed under the couch where the fire began does permit the inference that a BIC lighter could have been used to start the fire, as the Report and Recommendation stated. This is insufficient, however, to prove that a BIC lighter was in fact used, since there is no evidence that a lighter, and specifically a BIC lighter, was used to start the fire, and there is substantial circumstantial evidence to the contrary. Patricia Tabor, in the very portion of her deposition cited by plaintiffs' counsel, Patricia Tabor deposition at 31, admits that she has no idea

what brand of lighter at least one other member of the household used. Several of the residents of the address were smokers, and there were matches and different brands of disposable cigarette lighters in the house. Patricia Tabor deposition at 33, 34, 35-36, 81. As the Report and Recommendation points out, it is not BIC's burden to prove that its lighter could not have been used, it is plaintiffs' burden to prove that it was used. Proof of a possibility is not enough.

The plaintiffs' counsel's assertion that I falsely stated that neither the City of Altoona fire marshal nor the state police deputy fire marshal had identified any lighter as the cause of the fire relies on a misreading of the record. Plaintiffs' counsel quotes from Behe deposition at 4-5, in which the deputy fire marshal states why he felt that the fire resulted from Michael Tabor playing with a lighter. Left out of the quotation is the full text of deputy fire marshal Behe's explanation for his conclusion that it was probably Michael Tabor who started the fire with a lighter. See also Behe deposition at 7. A complete reading of the deposition indicates the only basis for the conclusion that a lighter was involved were the statement, ultimately traced back to Patricia Tabor, that a lighter was involved, a statement which Patricia Tabor admits she is without the knowledge to make, and testimony of other residents of the house that Michael Tabor had previously been believed to have possessed or used lighters. See also Mascia deposition at 16. If Behe's conclusion were an admissible expert opinion, therefore, it would completely exculpate BIC. Plaintiffs cannot have what they assert is the opinion of the expert witness admitted only in the part favorable to them.

What Behe did state as an expert opinion, and why the Report and Recommendation stated that the experts had not identified a lighter as the cause of the fire, was that "Any type of open flame could have ignited the couch." Id. at 6. This hardly acts as circumstantial evidence to narrow the source of the fire to a lighter, much less a BIC lighter.

Plaintiffs' counsel also states that the Report and Recommendation was "not completely true" in assessing the testimony of Altoona's fire inspector, John Mascia. Mascia, responding to a question about whether lighters or lighter components had ever been found stated:
A. No. But I think I did find some matches, pads of matches.
Q. Where did you find matches?

A. In that front room area, now if it was near the sofa, over from the sofa, I can't recall, but after going through and later on as we was (sic) doing a little investigating along with Behe--
Q. Okay.
A. I did find some matches. Mascia deposition at 16.
Mascia is very clear that he found pads of matches in the room where the fire started, as the Report and Recommendation stated. Plaintiff's counsel's attempt to turn Mascia's uncertainty as to where in the room the matches were found into a statement that Matches "were never identified as being in the ignition area" misreads the record.

I therefore am transmitting the record, my Report and Recommendation, and the objections to the Court for your consideration.

DATE:_____

_____
Keith A. Pesto
United States Magistrate Judge

cc: Terry A. Valko, Esq.
3037 Broad Avenue
Altoona, Pa 16601-1733

Richard Kraemer, Esq.
Marshall Dennehy Warner Coleman & Goggin
1845 Walnut Street
Philadelphia, PA 19103

David J. Weaver, Esq.
515 Main Street
Johnstown, PA 15901